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Definition of defences

Article __¹

[In addition to other modes of negating criminal responsibility permitted by this statute,] a person is not criminally responsible if at the time of that person's conduct:

(a) the person suffers from a mental disease or defect² that destroys that person's [judgement or his control over his actions] [capacity either to

¹ This paper is intended to facilitate the discussion on defence by streamlining the provisions in the draft. It covers the defences under articles L, M, N, O and P of the compilation contained in part 3 bis (General principles of criminal law) of volume II of the report of the Preparatory Committee (Supplement No. 22 (A/51/22), vol. II). It does not, however, address the question of whether the applicability of all or some defences should be limited to certain crimes. Mistake of fact or of law should be dealt with separately. Superior orders should also be covered in a separate article.

² The provision is meant to cover insanity resulting either from sickness ("disease") or from other causes ("defect").

appreciate the criminality of his or her conduct or conform that conduct to the requirements of law];³

(b) the person is in a state of intoxication that [destroys his or her judgement or control over his or her actions] [negates the mental element required by such crime]; provided, however, that if the person has voluntarily become intoxicated [with the pre-existing intent to commit the crime],⁴ the person shall remain criminally responsible;

(c) the person acts reasonably, or in the reasonable belief that force is necessary, to defend himself or herself or another person against an imminent and [unlawful] [unjustified] use of force in a manner not disproportionate to the degree of danger to the interest protected;

(d) the person reasonably believes that there is a threat of [imminent] death or serious bodily harm [or against the liberty] against that person or another person and the person acts reasonably to avoid this threat, provided that the person's action causes neither death nor a greater harm than the one sought to be avoided; if the person has knowingly exposed himself to a situation which was likely to lead to the threat, he shall remain criminally responsible;

(e) the person reasonably believes that there are circumstances caused by a sudden or extraordinary event which [are beyond that person's control and] constitute a threat of [imminent] death or serious bodily harm to that person or another person and the person acts reasonably in response to such threat, provided that the person's action causes neither death nor a greater harm than the one sought to be avoided.

³ The treatment of a person whose capacity is not fully impaired could be handled here, or in the "penalties" section by language along the following lines: "If a mental disease or defect merely influences his judgement or his control over his actions without destroying it, the person shall remain criminally responsible but his punishment may be reduced."

⁴ There are two approaches to the question of voluntary intoxication: If it is decided that voluntary intoxication should in no case be an acceptable defence, the text within the last square brackets would have to be deleted. In that case, however, provision should be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime committed due to their intoxication. If the text within the last square brackets were to be retained, the defence would apply in all cases of voluntary intoxication except for those in which the person became intoxicated in order to commit the crime in an intoxicated condition (actio libera in causa). This would probably lead to a great number of war crimes and crimes against humanity going unpunished.